averages for urban, suburban or rural areas), which reflect the conditions in its own market.[55]

The proposal of Comcast[56] and NCTA[57] to establish a default presumption of 6 attaching entities – 3 in rural areas – is a flawed approach, which the Commission should reject. Their proposal is premised on the assumption that every pole would have at least three attaching parties - electric, telephone and cable.[58] While that is not necessarily an accurate assumption, it is not determinative of the allocation of the 2/3 of the other than usable space. The Act requires an equal apportionment of the costs of unusable space among attaching entities *providing telecommunications services*.[59] Therefore only those cable and electric companies providing telecommunications services would count as attaching entities for purposes of allocating other than usable space costs. For reasons discussed above,[60] the incumbent local exchange carrier, which must bear all or part of the other 1/3 of the other than usable space costs, should also not be counted as an attaching entity.

Comcast and NCTA further rely on the Commission's recent Fiber Deployment Report to estimate the number of competitive local exchange carriers that

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55 *See, e.g.*, MCI at 15-16; SBC at 25; USTA at 13; Ameritech at 13; AEP et al at 44; Duquesne Light at 44; EEI/UTC at 24, NY State Investor Owned Electric Utilities at 24.

56 Comcast at 8.

57 NCTA at 20.

58 *See also*, AT&T at 13-14.

59 *See* 47 U.S.C. Section 224 (e)(1)(2)(emphasis added).

60 *Supra* at 20-22.

may qualify as attaching entities. As the Commission itself notes in its Report, however, merger and acquisition activity – particularly involving competitive access providers (CAPs) and cable companies – "has made reliable data collection difficult."[61] As a result, counting cable companies and CAPs separately as the Comcast study does is unlikely to reflect accurately the current number of attaching entities. A more reasonable and reliable approach is to allow pole owners to develop presumptive averages based on their existing data.

KMC asserts that utilities should be able to do pole by pole inventories of attachers since they must gather that information by pole each time they do a make ready survey for a particular new line of attachments.[62] While KMC is correct that such information is gathered in a make ready survey in order to determine if the additional attachments can be accommodated, the survey is done only for the particular set of poles involved. With approximately 5 million poles in Bell Atlantic's service area, it would be extremely expensive and administratively burdensome to conduct and maintain an up-to-date inventory of attachments by pole.

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61 Fiber Deployment Report at 38.

62 KMC at 6-7.

VI. The Commission Should Adopt Bell Atlantic's Definition of "Other Than Usable Space" for Conduits

Although the Act provides explicit guidance with regard to defining the usable space on a pole,[63] it does not provide any guidance as to how to define either usable or other than usable space in conduits. The Commission should adopt Bell Atlantic's proposal to define "other than usable" space in conduits as "encompassing all spare or excess capacity not actually being used by the conduit owner or any attaching entity."[64] This definition is most consistent with the plain meaning of the phrase, and ensures that the portion of conduit costs that benefit all attaching entities are shared by them.

A number of electric utilities claim that the only usable space is the duct itself and that the remainder of the conduit system is other than usable space.[65] The costs of the supporting components of the conduit system (e.g., cement and other stabilizing and reinforcing materials) and related costs (e.g., trenching and repaving) are reflected in local exchange carrier accounts and are recovered under the Commission's current usable space rate formula on a per duct in use basis. While the formula does not currently permit recovery of those costs to the extent associated with unused ducts (e.g., spare,

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[63] *See* 47 U.S.C. Section 224(d)(2).

[64] Bell Atlantic Comments at 9.

[65] *See, e.g.,* Electric Utility Coalition at 16; EEI/UTC at 29; Electric Utilities at 53.

maintenance and municipal ducts), those costs would be recoverable as other than usable space costs when Section 224(e) becomes effective, under Bell Atlantic's proposal.

AT&T[66] and MCI[67] argue that all conduit space and therefore all conduit costs must be categorized as usable because even maintenance and municipal ducts are, in fact, "used."[68] The fact that maintenance ducts, held in reserve for temporary emergency use, are periodically used for such purposes does not render them "usable" space. If they were usable, they could be charged to a specific entity; instead, they exist for the common good of all attaching entities as needed. Similarly, the fact that municipal authorities often require that a duct be reserved for public health and safety reasons does not make that space "usable" for purposes of cost recovery; instead, it is other than usable space that the facility owner(s) reserve for municipal purposes. The reservation of that space benefits all attaching entities, who would otherwise have to reserve ducts in their own

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[66] AT&T at 16.

[67] MCI at 16.

[68] AT&T also alleges that the Commission must treat all conduit as usable to avoid overrecovery. According to AT&T, if the Commission determines that maintenance ducts are to be treated as unusable, "the occupant would not only pay for part of the reserved duct pursuant to the unusable formula, the occupant would also bear the cost for part of the reserved duct's costs through the usable space formula." That is because under the FCC's proposed usable space formula, maintenance ducts are subtracted from the average number of ducts in the denominator of the occupied space component, thus reducing the denominator. That would not happen under Bell Atlantic's proposal to define other than usable space as including maintenance ducts. Under that approach, the average number of ducts in the denominator of the occupied space component of the usable space formula would not be adjusted for maintenance ducts. Thus the costs of the maintenance ducts would be recovered, as they should be, only as other than usable space costs.

facilities for municipal use if they built their own conduit instead of sharing access to existing conduit.

VII. Right of Way Issues Should Be Addressed on a Case by Case Basis

There is a general consensus among commenters that the Commission should not adopt any particular methodology for rates or other detailed rules for access to rights of way, but should instead address these issues on a case-by-case basis.[69] Nevertheless, there are several broad guidelines that the Commission should adopt to minimize the number of disputes that must be resolved through the complaint process.

First, the Commission should clarify that a utility may grant access to such rights of way to third parties only to the extent that, under state law or the terms under which the utility has obtained the right of way from the underlying property owner, it has the legal right to do so.[70] Even if such access is permitted, any third party attacher would be required to obtain any necessary approvals from the underlying property owners to its presence, and would be subject to the same restrictions and conditions on use of such rights of way as the utility to whom the right of way is granted.[71] In addition, the third party attacher must comply with all applicable environmental and zoning laws and bear all associated costs relating to such compliance. Any other terms of the occupation should be decided between the attaching entity and utility. If the grant of access to third

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[69] *See, e.g.*, MCI at 22; USTA at 14-15; Duquesne Light at 52.

[70] *See* Interconnection Order at para. 1179. *See also*, Bell Atlantic Further Reply Comments in CC Docket No. 96-98 at 12, n. 36 (filed June 3, 1996).

[71] Of course, the attaching entity enjoying access to the utility's right of way receives no property or other ownership interest in the utility's right of way. Interconnection Order at para. 1216.

parties causes the property owner to impose higher occupancy charges on the utility, the utility must be permitted to include those costs in any rates for such access. Similarly, if the Commission decides not to reconsider its decision to require utilities to exercise their powers of eminent domain on behalf of a prospective attaching entity,[72] the utility must be permitted to pass through directly to attaching entities all costs associated with that action, including any and all litigation expenses arising from or relating to the exercise of that power.

A. The Commission Should Not Assume That Capital Costs Associated With Rights of Way Have Already Been Recovered by Utilities

Without offering a shred of supporting evidence beyond mere unsubstantiated speculation, AT&T blithely urges the Commission to assume that a utility has already recovered any capital costs associated with obtaining rights-of-way; therefore, third parties seeking to share use of such rights-of-way "need only pay for direct and incremental costs."[73] AT&T's speculation is unfounded. First, it is based on the sweeping generalization that all such rights were obtained eons ago and the costs associated with acquisition of such right must be recovered by now.

In fact, certain rights may need to be obtained on an ongoing basis, as utilities must provide service to new developments, reroute facilities to accommodate construction of new roads and bridges, and renew outstanding right of way agreements.

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[72] Interconnection Order at para. 1181; *see also*, Petition of the Local Exchange Carrier Coalition for Reconsideration and Clarification, CC Dkt Nos. 96-98 and 95-185 (filed Sept. 30, 1996) at 23-24.

[73] AT&T at 18.

Moreover, if a right-of-way lease consists of a single upfront payment, that payment goes into a capital account and is recovered using the traditional group depreciation methodology.[74] As a result, the rates a utility may charge for access to its rights of way must reflect any appropriate capital costs associated with the acquisition or maintenance of such rights of way.

B. Access to ILEC Rooftops Is Beyond the Scope of This Proceeding

Teligent[75] and Winstar[76] seek to establish a methodology for access to ILEC rooftops on the ground that such access is critical for delivery of wireless services. The Commission has already determined that issues concerning access to ILEC rooftops are not governed by Section 224 but by the interconnection provisions of Section 251.[77] As such, they are beyond the scope of this proceeding.

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[74] If use of the right of way were to entail a capitalized lease, the capital would be recovered over the term of the lease, i.e., full recovery would not occur until the lease expires. Once a lease expires, however, either a new lease is negotiated or the use of the right-of-way must be terminated.

[75] Teligent at 2-12.

[76] Winstar at 3-14.

[77] Interconnection Order at para. 1185.

Conclusion

The Commission should adopt pole and conduit rate formulas to implement Section 224 of the Communications Act of 1934 that are consistent with Bell Atlantic's comments in this docket and in CS Docket No. 97-98.

Respectfully submitted,

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Appendix A

Analysis of AT&T's Appendix C

The first part of AT&T's new pole attachment rate formula is used to calculate usable space and reads as follows:

$$\frac{\text{space occupied by an attachment}}{\text{total usable space}} \times \frac{\text{total usable space}}{\text{pole height}} = \frac{\text{space occupied by an attachment}}{\text{pole height}}$$

Assuming one foot per attachment and a 37.5' pole, then:

$$\frac{\text{space occupied by an attachment}}{\text{pole height}} = \frac{1}{37.5}$$

The second part of the formula, used to calculate unusable space, contains the following computation:

$$\frac{\text{(pole height - total usable space)}}{\text{pole height}}$$

Using 37.5 for the pole height and 13.5 for the total usable space we get:

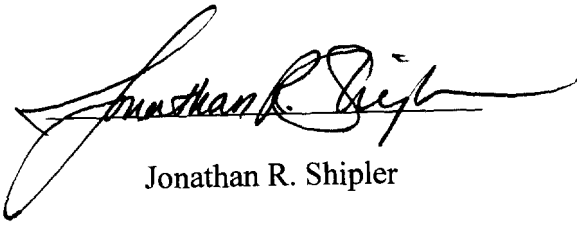
$$\frac{(37.5 - 13.5)}{37.5} = \frac{24}{37.5}$$

In order for there to be full recovery, the sum of the percentages for usable and unusable space should result in 100%. However, because AT&T incorrectly calculated the usable space percentage, we get the following:

$$\frac{1}{37.5}\ \text{(usable)} + \frac{24}{37.5}\ \text{(unusable)} = \frac{25}{37.5}\ \text{(or 66.6\%)}$$

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 1997, a copy of the foregoing "Reply Comments of Bell Atlantic" was served by first class U.S. mail, postage prepaid, on the parties listed on the attached service list.



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